recognized that, consistent with Congressional intent, regional programming should be treated differently from national programming. The Commission found that "by definition" NECN has a limited distribution potential which places it in "a significantly more precarious financial condition than that of other competing programming services that enjoy broader audience appeal."[45]

The Commission found that NECN had demonstrated that exclusive affiliations with cable operators "are required to attract and secure capital investments for production, promotion, distribution and carriage of its regional news service."[46] It also found that given its finding that "exclusivity plays a vital role in the growth and financial viability of NECN," exclusivity will "foster the public interest in promoting diversity in programming in this situation."[47]

Antitrust scholars and commentators have long recognized that exclusivity agreements are entered into in competitive markets without an anticompetitive motivation.[48] Exclusivity is common in the entertainment industry and is a well accepted contractual element in maximizing the value of copyrighted works. The

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45 NECN Order at 3236, ¶36.

46 NECN Order at 3238, ¶52.

47 NECN Order at 3237, ¶42.

48 See e.g., The Competitive Consequences of Vertical Integration in the Cable Industry", Benjamin Klein, University of California, Los Angeles, June 1989, attached to NCTA Comments, Competition Deregulation and Commission's Policies Relating to the Provision of Television Service, MM Docket No. 89-600, March 1, 1990.

seller puts potential buyers in competition for its goods; while the buyer benefits by being able to differentiate what it offers consumers from the services offered by competitors.[49] Basic economic theory indicates that exclusive dealing may encourage competition in the wholesale network program market and increase programming diversity without countervailing effects on competition in the distribution market.

As Professor Benjamin Klein notes:

> Even a satellite delivered cable programming network system without any cable operator ownership interest may find it profitable, [by the above reasoning,] to refrain from selling to noncable video delivery systems.[50]

The statute contemplates that the Commission may permit exclusivity for vertically integrated programming based on an assessment of whether exclusivity serves an investment incentive for cable operators to finance, promote and carry a new service.[51] In its initial program access order, the Commission stated:

> [W]e recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local originated programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market.[52]

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49 Id. at 50.

50 Id. at 51.

51 47 U.S.C. §548(c)(2)(C).

52 8 FCC Rcd at 3385.

Similarly, in its decision on program exclusivity in the cable and broadcast industries, the Commission lauded exclusivity as "a normal competitive tool" which "enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts."[53] The Commission expressed the view that:

> As long as there is reasonable competition among suppliers and distributors, exclusivity is a competitive tool that fosters the efficient channeling of programming to its most appropriate outlets, thereby maximizing the extent and diversity of programming available to viewers. In this context, the antitrust laws are the appropriate vehicle for dealing with those relatively rare situations in which exclusivity can be used to hinder competition.[54]

Against this policy backdrop, the Commission should not handicap the workings of the video programming market by endorsing the intrusive and unwarranted program access proposals of cable's competitors. Alternative MVPDs that would demand access to non-satellite delivered, locally-produced programming are simply asking to be rescued from marketplace competition by the government.[55]

The media companies that are competing with cable certainly appreciate the benefits of exclusive arrangements. The DBS industry recognizes exclusivity may boost

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53 Program Exclusivity in Cable and Broadcast Industries supra n.2 at 5309-10.

54 Id. at 5310.

55 A competitor's inability to achieve a competitive position "on par" with another distributor is not sufficient to warrant government intervention. Comments of DirecTV at 2. Nothing in the Act requires programmers to take steps to protect or guarantee the competitive success of a particular multichannel distributor. There is no suggestion of market foreclosure occurring here. In fact, overbuilders like Ameritech are entering the market and DBS is well-established as a competitor -- all without expansion of Section 628.

subscribership and give it a competitive edge in a fast-changing video market. DirecTV, USSB and others intend to move toward more original programming that is not available on cable or any other satellite outlet.[56] In particular, DirecTV, is reported to be looking at crafting its own music, sports, educational, children's and instructional series and specials to counter cable's offerings.

In its own comments in this proceeding, DirecTV provides marketing material touting its offer of sports programming from every major professional league, such as NFL Sunday Ticket, MLB Extra Innings, NHL Center Ice, and NBA League Pass "not available on cable!"[57] Recent DirecTV ads announce that "we're the exclusive mini-dish provider for NFL Sunday Night Ticket. So you won't find it on any other mini-dish system, or on cable, either." See Attachment. USSB too is planning to develop a special movie channel for satellite dish owners.[58]

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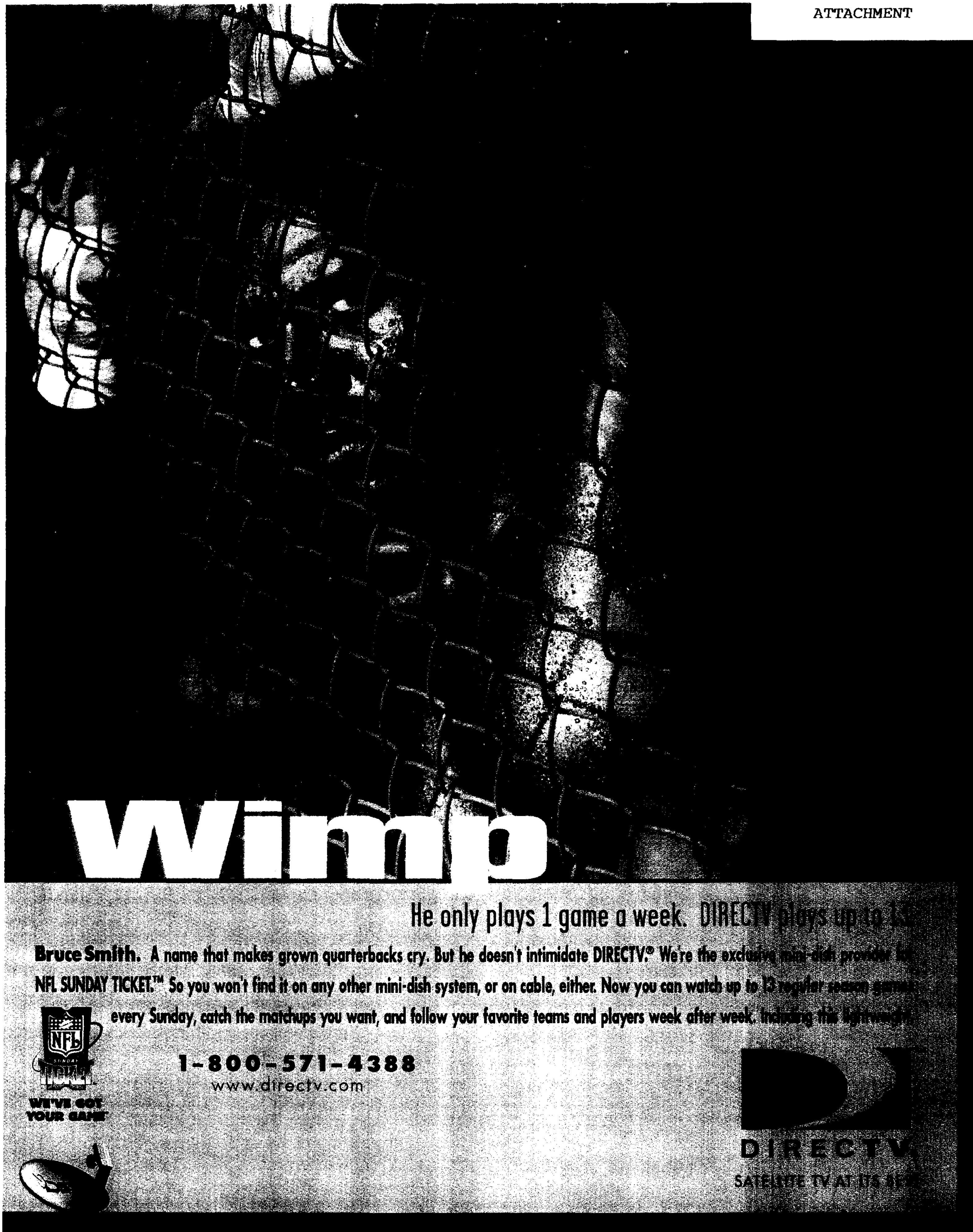
56 "More Original Thinking", *Cable World*, July 21, 1997.

57 DirecTV recently filed an application for 6 more satellites to enable it to distribute a wider variety of programming. Comments of DirecTV at 10-11.

58 *Cable World*, Aug. 11, 1997, at 37.


Wimp
He only plays 1 game a week. DIRECTV
Bruce Smith. A name that makes grown quarterbacks cry. But he doesn't intimidate DIRECTV.® We're the exclusive
NFL SUNDAY TICKET.™ So you won't find it on any other mini-dish system, or on cable, either. Now you can watch up to 13
every Sunday, catch the matchups you want, and follow your favorite teams and players week after week.
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In an effort to lure customers from competing cable systems, Americast is pursuing a strategy of starting to produce more local news, sports and information programming, which would be exclusive to its systems.[59] In announcing that they are shifting its original programming development to Disney, Americast partners indicated that they intend to develop programming on a local basis, including a new service in the Tampa Bay area to compete with a similar service offered by the incumbent Time Warner system.[60] In light of these efforts, Ameritech's claim that "differentiation is to be achieved by packaging, value, features and pricing, not by content" rings all the more hollow.[61]

Cable operators spend money to build an audience for a new channel through rights acquisitions, assembling of staff, advertisements and bill stuffers, and other promotional activities. In the face of crowded channel capacity, if they must hand over the programming to a competitor, then why would they bother to pursue innovative programming in the first place. Such a requirement would create a major disincentive to the development of costly and risky ventures such as local news programming.[62]

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59 "Americast Slimming," *Daily Variety*, July 28, 1997.

60 "Americast pulling plug on programming business", *Electronic Media*, August 4, 1997 at 29.

61 Comments of Ameritech at 4 (emphasis added).

62 See also NewsChannel, 10 FCC Rcd 691 (1994) (granting a seven-year exclusive distribution right in four mid-Atlantic states).

The Commission has recognized that the video distribution media ought to be able to differentiate themselves through exclusive arrangements with program suppliers. As noted above, the competing MVPDs are backed by giant corporations -- e.g. RBOCs, DBS (Hughes, AT&T), MMDS (BellSouth, PacBell) -- that have the money to bid for exclusivity and, as shown above, invest in the development of new programming without government intervention. To the extent exclusivity is sought among the players in today's video programming market, it reflects a healthy market reality, enjoyed and touted by cable competitors, not a foreclosure of competition.

II. REGIONAL CLUSTERING ENHANCES COMPETITION AND CHOICE FOR CONSUMERS

With no empirical evidence to support a recommendation to Congress to modify the program access rules, cable's numerous competitors claim, as we noted above, that recent consolidation and joint ventures in the cable industry risk setbacks in the gains made under the program access rules. Some commenters urge the Commission to "closely examine" consolidation in the cable industry and to expand the program access rules to address this trend.[63]

As we showed in our initial comments, clustering and interconnecting cable systems in close proximity to each other is associated with many pro-consumer benefits. The efficiencies gained by clustering cable systems that would otherwise serve smaller,

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63 See e.g., Comments of Ameritech at 36-40.

geographically dispersed areas are also essential to cable's ability to compete in the video, data and telecommunications field with giant geographically concentrated Regional Bell Operating Companies, major electric utilities, and nationwide DBS companies.

The following describes several capital, operational and technological efficiencies associated with clustering that facilitate higher quality and lower cost cable service:

- Improved ability to sell local and regional advertising. Cable television does not attract a share of local and regional advertisers that is proportional to the viewing of cable programming services. This is so because any single cable system typically does not reach a sufficiently large audience to make cable advertising expenditures attractive. In order to reach an entire metropolitan area (or television ADI), for instance, advertisers may need to contact, and come to terms with, as many as twenty different cable operators. This is not only time-consuming, but expensive for local and regional advertisers.

  Cable systems have attempted to deal with this problem by forming advertising cooperatives, but such cooperatives are difficult to organize, frequently take years to develop and often operate inefficiently (i.e., they typically require unanimous consent to increased capital investments, commitments of advertising time, or other key decisions). There also are substantial practical limitations, such as differing channel line-ups, that make advertising cooperatives a poor alternative for advertisers. Clustering cable substantially reduces these difficulties and therefore results in greater use of cable advertising by local and regional merchants and increased revenue.

- Lower costs of promoting cable systems to potential subscribers. Currently, it is difficult and expensive for cable operators to advertise their own services using media such as radio, broadcast television, and local newspapers because a substantial portion of the audiences reached by such media are not in fact served by the operator. Clustering increases the number of potential subscribers an operator can reach with each advertising dollar. In addition, clustering makes it easier to engage in more attractive joint consumer promotions with area retailers and others because the clustered group's service area will more closely approximate the customer base of the other party.

- Greater ability to develop regional program services. Regional programming services, such as news and sports, are often difficult for any single cable operator to develop if its systems cover only a fraction of a given metropolitan area. The ability to spread the costs of programming over a greater number of subscribers increases the prospects for success. As with advertising, efforts to jointly develop and operate such programs can be cumbersome and inefficient.

- Improved maintenance and customer service. Clustering enhances customer service. In a clustered environment, cable operators can centralize the customer service and maintenance functions to reduce the number of different call centers and better position different truck fleets to offer quicker and better service. In addition, operating support and network management systems can be implemented more cost effectively. The cost of expensive processors can be shared across a larger number of subscribers.

- Ubiquitous communication and programming. By establishing a regional network, cable operators can provide increased interconnectivity so that local origination, government and educational channels can be aired to one, several, or all communities in the cluster. Institutional networks could obtain the same benefit because they would interconnect with a much larger base. This is particularly important to educators who wish to use interconnections for distance learning.

- New and advanced services. In the case of new services, clustering is not merely important to achieving lower costs and improved quality of service, it is likely to prove essential to the ultimate success of new video, information, and telephony services.

  Cable systems must make very substantial additional financial investments in order to bring these new services into existence. Without the efficiencies of clustering, the expected returns on such investments will be substantially reduced. Operators may find it uneconomic to make the necessary investments to supply many of these services if they cannot cluster systems to expand the area in which the services are offered and to thereby reduce costs. Even where some of these new services might eventually be supplied, the loss of clustering efficiencies is likely to delay substantially the time when they are introduced.

Clustering efficiencies will enhance cable operators' ability to offer new interactive services in a variety of ways. First, delivering these services to a larger number of subscribers will reduce the per-subscriber cost of expensive file servers, switches, and high capacity storage devices. Second, many of the other efficiencies of clustering described for traditional video service also will yield efficiencies that make new services more attractive, including lower maintenance and operating costs, reduced repair times and improved service quality, a more efficient system architecture with fewer miles of cable plant, and reduced per-customer marketing costs.

- Telephony. Efficiencies from clustering also will be crucial in making it economic for cable operators to offer telephony services. For example, a principal service-specific investment necessary for wireline service is the telephone switch. The profitability of offering telephony depends significantly on the cost of the switch and the proportion of cable subscribers who choose to take telephone service from their cable company. The ability to serve dispersed systems from a common switch is limited. Because voice conversations and telephone signaling can tolerate only small time delays, a switch must be located within a relatively short distance of a subscriber. These economies are particularly important given the fact that a cable operator seeking to provide telephony service will face a very well-established competitor with a very large initial market share and a well-established reputation. Clustering, by making it possible for cable operators to offer telephony to a relatively large base of potential subscribers, is thus critical to the operators' ability to realize the necessary scale economies.

The National Telecommunications and Information Administration (NTIA) recognized over two years ago that clustering as a competitive strategy serves the public interest. NTIA told the Federal Trade Commission that clustering serves "at least" two important benefits: reducing costs and facilitating entry into telephone service.[64] For

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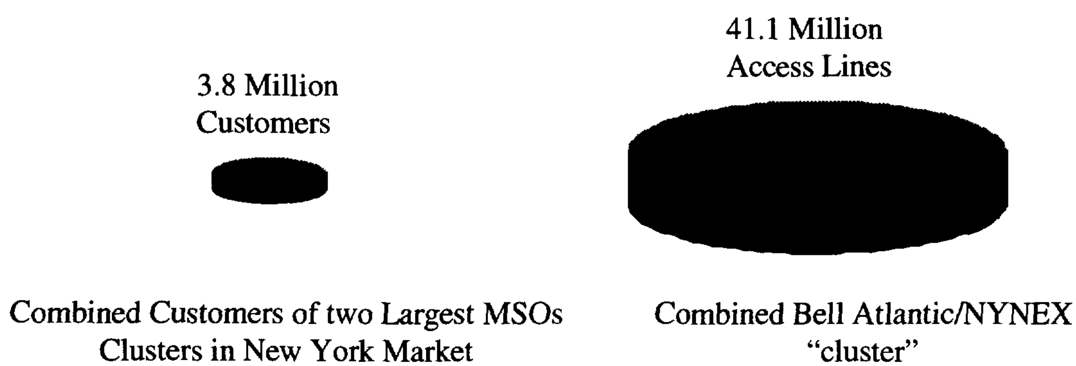
[64] Letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce to Chairman Janet D. Steiger, Federal Trade Commission (January 12, 1995). The Commission also has previously acknowledged the pro-consumer benefits of clustering. See First Annual Report, 9 F.C.C. Rcd 7442, 7518-19 (1994).

these and other reasons, all transactions involving clustering of cable systems that have been reviewed by the Commission and the federal antitrust agencies to date have been approved.

Indeed, cable's relatively modest regional consolidation efforts are no match for the megamergers of its rivals. For example, the RBOC's comments focus on the consolidation of New York area cable systems, which together reach about 3.8 million television households.[65] In light of BellSouth's size -- 24.5 million access lines in nine contiguous states -- and a merged Bell Atlantic/NYNEX -- 41.1 million access lines in 14 contiguous states -- the largest cable system pales in comparison. (See chart below.)

COMPARISON OF CLUSTERING : CABLE VS. TELEPHONE COMPANIES



It is ironic that the RBOCs criticize cable clustering efforts when one purpose of such efforts is to provide competition to those monopoly providers of local exchange

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65 See e.g., Comments of BellSouth at 4-5. (3.8 million represents combined Cablevision and Time Warner DMA subscriber if mergers are complete.)

service. It also comes with ill grace from companies whose size dwarfs that of even the largest cable systems.

The Commission also should note that the level of competition in the video programming business stands in stark contrast to the local telephone marketplace. Today, local telephone monopolies continue to control 99% of the local residential phone business; consumers have real choice between providers in the video market. For the monopoly telcos to criticize cable clustering efforts which may lead to breaking that monopoly is the height of arrogance.

There is no empirical evidence to warrant intervention in the programming market on the grounds that clustering is hindering competition. For these reasons, as we have done in the past, we urge the Commission not to interfere with the marketplace forces that are driving consolidation and regional clustering in the cable industry.

CONCLUSION

The MVPD industry is increasingly competitive, and this trend is not going to change. Programming of vertically and non-vertically integrated services is widely available to all MVPDs and the statutory mechanism for resolving individual complaints is not overburdened. Congress correctly concluded that, in most cases, non-vertically integrated programmers and terrestrially-delivered programming need not be -- and should not be -- covered by the program access rules. There has been no evidence presented in this proceeding to change that conclusion. Unless the Commission is prepared to gut all forms of program exclusivity in an effort to assist multibillion-dollar corporations to take advantage of the investments of others, it should reject proposals to extend Section 628.

Respectfully submitted,

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August 20, 1997

APPENDIX A

STATUS OF PROGRAM ACCESS COMPLAINTS

	COMPLAINANT	DEFENDANT	DATE RESOLVED	RESOLUTION
1.	Consumer Satellite Systems	Lifetime	Jun. 27, 1994	Settled
2.	Mid-Atlantic Cable Service	Home Team Sports/Columbia Cable	Jul. 29, 1994	Settled *(Parties agree to termination of complaint)*
3.	Liberty Cable	Court TV	Aug. 2, 1994	Settled *(Liberty complaint dismissed; prior ruling found Time Warner not entitled to exclusive distribution of Court TV)*
4.	Hutchins Communications	TCI of Georgia	Sept. 6, 1994	Dismissed as moot *(Production company lacks standing to file program access complainant)*
5.	Electric Plant Board of City of Glasgow	Turner Cable Network Sales	Sept. 6, 1994	Dismissed *(Pre-June 1, 1990 exclusive programming contracts valid)*
6.	CableAmerica	Times Mirror	Sept. 9, 1994	Settled *(Parties agree to termination of complaint; Arizona Sports Programming Network not a satellite programmer)*
7.	Private Network Cable Systems	SportsChannel Associates	Sept. 23, 1994	Settled *(Complaint withdrawn)*
8.	CellularVision	SportsChannel Associates	Aug. 24, 1995 *(Recon. Mar. 12, 1996)*	For complainant *(SportsChannel provided no legitimate business reason for refusing to sell programming to CellularVision)*
9.	NRTC	EMI Communications Corp.	Sept. 7, 1995	Settled
10.	CAI Wireless	Cablevision/MSG Network	Mar. 12, 1996	Withdrawn

	COMPLAINANT	DEFENDANT	DATE RESOLVED	RESOLUTION
11.	CAI Wireless	Cablevision/Rainbow/ SportsChannel New England/ SportsChannel N.Y.	Mar. 14, 1996	Withdrawn
12-17.	Consumer Satellite Systems *(6 consolidated complaints)*	United Video	Jul. 1, 1996	Settled *(Complaint dismissed at joint request of parties)*
18.	Americast/Ameritech	Continental Cablevision & HBO	Jul. 3, 1996 *(Recon. denied Mar. 17, 1997)*	Denied *(Pre-June 1, 1990 exclusive programming contracts valid)*
19.	American Cable Co	TeleCable	Aug. 29, 1996	Denied *(Pre-June 1, 1990 exclusive programming contracts valid; non-uniform rate structure not unfair method of competition)*
20-22.	• Interface Communications • Digital Broadband • RCN of Massachusetts	Cablevision/Rainbow	Sept. 13, 1996	Dismissed as moot *(Complaints dismissed; program access provided)*
23.	Tele-TV	Century/Prime Ticket	Dec. 20, 1996	Settled *(Complaint dismissed at joint request of parties)*
24.	OpTel	Century	Dec. 20, 1996	Settled *(Complaint dismissed at joint request of parties)*
25-26.	• Cross-Country Cable • Robert Burgess	C-TEC	Mar. 5, 1997	Denied *(Non-uniform rate structure not unfair method of competition)*
27.	OpTel	American Cablesystems	Mar. 6, 1997	Settled *(OpTel permitted to carry Prime Ticket)*
28.	RCN of Massachusetts	Cablevision/Rainbow	May 9, 1997	Settled *(Complaint dismissed; program access provided)*

	COMPLAINANT	DEFENDANT	DATE RESOLVED	RESOLUTION
29.	Bell Atlantic Video Services	Rainbow/Cablevision	Jul. 11, 1997	For complainant *(Rainbow unreasonably refused to sell regional sports programming to BVS)*
30.	Classic Sports *(a §616 complaint)*	Cablevision	Jul. 16, 1997	Hearing Designated *(To determine whether Cablevision required an interest in Classic as a condition of carriage)*
31.	British-American Communications	Prime Ticket	Jul. 17, 1997	Settled *(British-American permitted to carry Prime Ticket)*

SUMMARY OF COMPLAINTS

RESOLUTION	TOTAL
Denied	4
Dismissed	1
Dismissed as Moot	4
For Complainant	2
Hearing Pending	1
Settled	17
Withdrawn	2